
# U.S. Defense Articles and Services Supplied to Foreign Recipients: Restrictions on Their Use

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# Summary

In accordance with United States law, the U.S. Government places conditions on the use of defense articles and defense services transferred by it to foreign recipients. Violation of these conditions can lead to the suspension of deliveries or termination of the contracts for such defense items, among other things. On occasion, the President has indicated that such violations by foreign countries "may" have occurred, raising the prospect that termination of deliveries to or imposition of other penalties on such nations might take place. Section 3(a) of the Arms Export Control Act (AECA) sets the general standards for countries or international organizations to be eligible to receive United States defense articles and defense services provided under this act. It also sets express conditions on the uses to which these defense items may be put. Section 4 of the Arms Export Control Act states that U.S. defense articles and defense services shall be sold to friendly countries "solely" for use in "internal security," for use in "legitimate self-defense," to enable the recipient to participate in "regional or collective arrangements or measures consistent with the Charter of the United Nations," to enable the recipient to participate in "collective measures requested by the United Nations for the purpose of maintaining or restoring international peace and security," and to enable the foreign military forces "in less developed countries to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries."

Section 3(c)(2) of the Arms Export Control Act requires the President to report promptly to the Congress upon the receipt of information that a "substantial violation" described in Section 3(c)(1) of the AECA "may have occurred." This Presidential report need not reach any conclusion regarding the possible violation or provide any particular data other than that necessary to illustrate that the President has received information indicating a specific country may have engaged in a "substantial violation" of an applicable agreement with the United States that governs the sale of U.S. defense articles or services. Should the President determine and report in writing to Congress or if Congress determines through enactment of a joint resolution pursuant to Section 3(c)(3)(A) of the Arms Export Control Act that a "substantial violation" by a foreign country of an applicable agreement governing an arms sale has occurred, then that country becomes ineligible for further U.S. military sales under the AECA. This action would terminate provision of credits, loan guarantees, cash sales, and deliveries pursuant to previous sales. Since the major revision of U.S. arms export law in 1976, neither the President nor the Congress have actually determined that a violation did occur thus necessitating the termination of deliveries or sales or other penalties set out in Section 3 of the Arms Export Control Act. The United States Government has other options under the Arms Export Control Act to prevent transfer of defense articles and services for which valid contracts exist short of finding a foreign country in violation of an applicable agreement with the United States. These options include suspension of deliveries of defense items already ordered and refusal to allow new arms orders. The United States has utilized at least one such option against Argentina, Israel, Indonesia, and Turkey.

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# Introduction

In accordance with United States law, the U.S. Government places conditions on the use of defense articles and defense services transferred by it to foreign recipients. Violation of these conditions can lead to the suspension of deliveries or termination of the contracts for such defense items, among other things. On occasion, the President has indicated that such violations by foreign countries "may" have occurred, raising the prospect that termination of deliveries to or imposition of other penalties on such nations might take place. However, since the major revision of U.S. arms export law in 1976, neither the President nor the Congress have actually determined that a "substantial violation" did occur thus necessitating the termination of deliveries or sales or other penalties set out in Section 3 of the Arms Export Control Act. This report reviews the pertinent sections of U.S. law governing permissible uses of U.S.-origin defense equipment and services by foreign nations, Presidential and congressional options for dealing with such violations, and illustrative actions previously taken by the United States in response to possible violations.

# Arms Export Control Act (AECA): Basic Conditions on Use of U.S.-Supplied Defense Articles and Services

The Arms Export Control Act (AECA), as amended, authorizes the transfer by sale or lease of United States origin defense articles and services through the government-to-government foreign military sales (FMS) program or through the licensed commercial sales process.[1] Section 3(a) of the Arms Export Control Act sets the general standards for countries or international organizations to be eligible to receive United States defense articles and defense services provided under this act. It also sets express conditions on the uses to which these defense items may be put. Section 3(a)(2) of the AECA specifically provides that to be eligible to purchase defense articles and services from the United States:

> ...[a] country or international organization shall have agreed not ... to use or permit the use of [a defense] article or related training or other defense service for purposes other than those for which furnished, unless the consent of the President has first been obtained....

Section 3(c) of the Arms Export Control Act further sets out the circumstances under which a nation may lose (a) its U.S. Foreign Military Financing, (b) its loan guarantees for purchases of U.S. defense articles and services, (c) its rights to have previously purchased U.S. defense articles or services delivered, (d) its rights to have previously made agreements for the sale of U.S. defense articles or services carried out. Section 3(c)(1)(A) of the Arms Export Control Act stipulates, in part, that:

[1] The International Security Assistance and Arms Export Control Act of 1976 (P.L. 94-329), enacted on June 30, 1976, changed the title of the Foreign Military Sales Act (FMSA) of 1968 (P.L. 90-629), as amended, to its present one—the Arms Export Control Act. (22 U.S.C. 2751 et. seq.) All references to the predecessor statute, the FMSA, are legally deemed to be references to the AECA.

> No credits (including participations in credits) may be issued and no guarantees may be extended for any foreign country under this Act as hereinafter provided, if such country uses defense articles or defense services furnished under this Act, or any predecessor Act, in substantial violation (either in terms of the quantities or in terms of the gravity of the consequences regardless of the quantities involved) of *any agreement entered into pursuant to any such Act*[2] ... by using such articles or services for a purpose not authorized under section 4 or, if such agreement provides that such articles and services may only be used for purposes more limited than those authorized under section 4 for a purpose not authorized under such agreement....

Section 3(c)(1)(B) of the AECA adds that, under the above conditions: "[n]o cash sales or deliveries pursuant to previous sales may be made...." Section 3(g) of the Arms Export Control Act, enacted in November 1999, further requires that:

> Any agreement for the sale or lease of any article on the United States Munitions List entered into by the United States Government after the date of enactment of this subsection [November 29, 1999[3]] shall state that the United States Government retains the right to verify credible reports that such article has been used for a purpose not authorized under section 4 or, if such agreement provides that such article may only be used for purposes more limited than those authorized under section 4, for a purpose not authorized under such agreement.

## Purposes for Which Military Sales by the United States Are Authorized (Section 4 of the Arms Export Control Act)

The purposes for which sales of defense articles and services by the United States are authorized are detailed in Section 4 of the Arms Export Control Act. This section of the act states that defense articles and defense services shall be sold to friendly countries "solely for":

- "internal security"
- "legitimate self-defense"
- enabling the recipient to participate in "regional or collective arrangements or measures consistent with the Charter of the United Nations"
- enabling the recipient to participate in "collective measures requested by the United Nations for the purpose of maintaining or restoring international peace and security"
- enabling the foreign military forces "in less developed countries to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries."

It should be stressed that the Arms Export Control Act as amended, the Foreign Assistance Act of 1961 as amended, and predecessor acts do not define such critical terms as "internal security" and

[2] Emphasis added. The statute makes clear that any sanctions that may be applied are for "substantial violation" of an *agreement* entered into with the United States pursuant to the AECA or any predecessor Act, and not for a violation of the AECA itself or its predecessors.

[3] Added by §1225 of the Security Assistance Act of 1999 (Title XII of H.R. 3427), enacted by reference in §1000(a)(7) of P.L. 106-113; 113 Stat. 1526.

"legitimate self-defense." It remains for the President or the Congress, as the case may be, to define the meaning of such terms as they may apply to the question of a possible violation by a foreign country of an applicable agreement governing the sale of U.S. defense articles or defense services.

## Presidential Report to Congress on Possible Violations

Section 3(c)(2) of the Arms Export Control Act requires the President to report promptly to the Congress upon the receipt of information that a "substantial violation" described in Section 3(c)(1) of the AECA "may have occurred." This Presidential report need not reach any conclusion regarding the possible violation or provide any particular data other than that necessary to illustrate that the President has received information indicating a specific country may have engaged in a "substantial violation" of an applicable agreement with the United States that governs the sale of U.S. defense articles or services.

## Procedures for Making Foreign Countries Ineligible for Receipt of U.S. Defense Articles and Services

Should the President determine and report in writing to Congress or if Congress determines by joint resolution pursuant to Section 3(c)(3)(A) of the Arms Export Control Act that a "substantial violation" by a foreign country of an applicable agreement governing an arms sale has occurred, then that country becomes ineligible for further U.S. military sales under the AECA. This action would terminate provision of credits, loan guarantees, cash sales, and deliveries pursuant to previous sales. The President could, under Section 3(c)(3)(B) of the AECA, continue to permit "cash sales and deliveries pursuant to previous sales" by certifying in writing to Congress that termination of such sales and deliveries would have a "significant adverse impact on United States security." Such a Presidential waiver could not be invoked, however, if Congress, under Section 3(c)(3)(A), had adopted or were to adopt a joint resolution finding that country ineligible. The President retains the prerogative of vetoing any such joint resolution. Congress would then have to override the veto in order to impose its will. Congress also has the option of adopting regular legislation imposing varying degrees of penalties upon any country for violations of the conditions of an applicable agreement regarding use of U.S.-supplied defense equipment. Such legislation would also be subject to the veto process.[4]

## Restoration of Eligibility

Once a country is made ineligible for sales or deliveries under the Arms Export Control Act provisions, it can regain its eligibility only when: (1) Under Section 3(c)(4) of the act, *the President* "determines that the violation has ceased" (the violation which led to the status of ineligibility in the first place), and (2) the country involved "has given assurances satisfactory to

[4] It should be noted that the obligations, restrictions, and possible penalties set out in §3 of the Arms Export Control Act also apply to the re-transfer by foreign recipients of U.S. supplied defense articles, defense services, and related technical data to another nation. Should such a re-transfer occur, in the absence of prior approval by the President of the United States to do so, then the nation making such a transfer could be determined to be in violation of its agreement with the United States not to take such an action without prior consent from the U.S., and therefore could be subject to the penalties provided for such a violation set out in §3 of the AECA. See §3(a)(2) of the AECA where the re-transfer prior consent obligation is set out (22 USC 2753 (a)(2)).

the President that such violation will not recur." Alternatively, Congress could pass regular legislation that would exempt the particular country from specific sanctions imposed through AECA procedures, although that legislation would be subject to a Presidential veto.

## Suspension or Cancellation of Contracts and/or Deliveries by the United States

It should be noted that the United States has additional options to prevent transfer of defense articles and services for which valid contracts exist short of finding a foreign country in violation of an applicable agreement with the United States. Authority for suspension of deliveries or defense items or cancellation of military sales contracts is found in Sections 2(b), 42(e)(1) and 42(e)(2) of the AECA. Section 2(b) of the Arms Export Control Act permits the Secretary of State, under the President's direction, to, among other things, determine "whether there shall be delivery or other performance" regarding sales or exports under the AECA in order that "the foreign policy of the United States is best served thereby."

Section 42(e)(1) of the Arms Export Control Act states that:

> Each contract for sale entered into under sections 21, 22, 29 and 30 of this Act, and each contract entered into under section 27(d) of the Act, shall provide that such contract may be canceled in whole or in part, or its execution suspended, by the United States at any time under unusual or compelling circumstances if the national interest so requires.

Section 42(e)(2)(A) of the Arms Export Control Act further states that:

> Each export license issued under section 38 of this Act shall provide that such license may be revoked, suspended, or amended by the Secretary of State, without prior notice, whenever the Secretary deems such action to be advisable.

Thus, all government-to-government agreements or licensed commercial contracts for the transfer of defense articles or defense services may be halted, modified, or terminated by the Executive branch should it determine it is appropriate to do so.

Use of this authority does not prejudice the larger question of whether a "substantial violation" of an applicable agreement governing use of U.S. arms did in fact occur. That question can still be answered affirmatively or negatively, or left unanswered, depending on how the President or the Congress chooses to deal with it. To date, the President has never taken the next step and actually determined that a violation did occur thus necessitating the termination of deliveries or sales or other penalties set out in Section 3 of the Arms Export Control Act.

# Illustrative Responses of the United States Government to Possible Violations of Agreements on Use of U.S.-Provided Defense Articles

## Argentina

On April 30, 1982, Powell A. Moore, Assistant Secretary of State for Congressional Relations, reported to Congress that the President had determined that Argentina—through its use of U.S.-supplied military equipment in its occupation of the Falkland Islands (Islas Malvinas) on April 2, 1982—"may" have substantially violated the applicable agreements with the United States governing use of this equipment. In his April 30 report, Assistant Secretary Moore noted that in light of these circumstances the United States was "suspending until further notice all deliveries to Argentina of defense articles and services for which commitments were made prior to October 1, 1978." Other restrictions on military aid to Argentina were already in place. The Reagan Administration removed the suspension on September 24, 1982.

## Israel

Questions raised regarding the use of U.S.-supplied military equipment by Israel in Lebanon in June and July 1982, led the Reagan Administration to determine on July 15, 1982, that Israel "may" have violated its July 23, 1952, Mutual Defense Assistance Agreement with the United States (TIAS 2675). Concerns centered on whether or not Israel had used U.S.-supplied anti-personnel cluster bombs against civilian targets during its military operations in Lebanon and the siege of Beirut.[5] The pertinent segment of that 1952 agreement between Israel and the United States reads as follows:

> The Government of Israel assures the United States Government that such equipment, materials, or services as may be acquired from the United States ... are required for and will be used solely to maintain its internal security, its legitimate self-defense, or to permit it to participate in the defense of the area of which it is a part, or in United Nations collective security arrangements and measures, and that it will not undertake any act of aggression against any other state.

It should be noted that none of the critical terms such as "internal security," "legitimate self-defense," or "act of aggression" are defined within this 1952 U.S.-Israeli agreement. The House Foreign Affairs Committee held hearings on this issue in July and August 1982. On July 19, 1982, the Reagan Administration announced that it would prohibit new exports of cluster bombs to Israel. This prohibition was lifted by the Reagan Administration in November 1988.[6]

[5] See U.S. Congress. House. Committee on Foreign Affairs, The Use of United States Supplied Military Equipment in Lebanon. Hearings before the Committee on Foreign Affairs and its Subcommittees on International Security and Scientific Affairs and on Europe and the Middle East. 97th Congress, 2nd sess. July 15 and August 4, 1982. 68p. These hearings were held in open and closed sessions.

[6] Facts on File. Annual Yearbook 1982, p. 518; Associated Press, July 19, 1982. *Washington Post*, December 7, 1988, p. A36; Associated Press, December 6, 1988.

In light of the Israeli attack on the Iraqi nuclear reactor on June 7, 1981, Secretary of State Alexander M. Haig, Jr., reported to Congress on June 10, 1981, that the Israeli use of American-supplied military equipment in this raid "may" have constituted a substantial violation of the applicable 1952 U.S.-Israeli agreement. As a consequence—and pending review of the facts of the case—the President chose to exercise the authority set forth in Sections 2 (b) and 42(e)(1) of the Arms Export Control Act to suspend "for the time being" the shipment of four F-16 aircraft that had been scheduled for delivery to Israel. As the result of this decision, the subsequent delivery of 10 F-16 and 2 F-15 aircraft to Israel was also suspended. However, on August 17, 1981, the Reagan Administration lifted its suspension on deliveries to Israel and all of the planes were transferred.

On two other occasions—April 5, 1978, and August 7, 1979—the Carter Administration chose to find that the Israelis "may" have violated their 1952 agreement with the United States through the use of American-origin military equipment in operations conducted in Lebanon. However, the U.S. did not suspend or terminate any Israeli arms sales, credits, or deliveries in either of these cases.

In two notable instances, questions concerning the improper use by Israel of U.S. weapons were raised, but the President expressly concluded that a violation of the agreement regarding use of U.S. supplied equipment did not occur. On October 1, 1985, Israel used U.S.-supplied aircraft to bomb Palestine Liberation Organization (PLO) headquarters in Tunis, Tunisia. The Reagan Administration subsequently stated that the Israeli raid was "understandable as an expression of self-defense," although the bombing itself "cannot be condoned." On July 14, 1976, following the Israeli rescue mission at Entebbe, Uganda in early July 1976, the Department of State declared that Israel's use of U.S.-supplied military equipment during that operation was in accordance with the 1952 U.S.-Israeli agreement.

## Indonesia and East Timor

Following the military intervention of Indonesia in East Timor on December 7, 1975, the Ford Administration initiated a "policy review" in connection with the U.S. military assistance program with Indonesia. Because of the possible conflict between the Indonesian use of U.S.-origin equipment in East Timor and the provisions of U.S. law and U.S.-Indonesian bilateral agreements, the Ford Administration placed a "hold" on the issuance of new letters of offer (contracts) and Military Assistance Program (MAP) orders to Indonesia. However, military equipment already in the pipeline continued to be delivered to the Indonesians. The "policy review" was completed in late May 1976. Military assistance and sales resumed in July 1976. No formal finding of "substantial violation" of applicable U.S.-Indonesian agreements involving use of U.S.-origin military equipment, conditional or otherwise, was made by the administration or by the Congress.

## Turkey and the Congressionally Imposed Embargo

In July 1974, Turkey used U.S.-origin equipment during its intervention on Cyprus. The President and Congress disagreed on whether Turkey had "substantially violated" the applicable 1947 agreement with the United States governing the use of U.S.-supplied military equipment during its Cyprus operations. The President independently suspended the issuance of new Foreign Military Sales credits and guarantees and major new cash sales for Turkey from late July until October 17, 1974. The President did permit routine cash sales of spare parts and components for

items already purchased by Turkey during this same period. The Congress imposed an embargo on military sales, credits, assistance, and deliveries to Turkey with the enactment of H.J.Res. 1167 (the Continuing Appropriations Resolution for FY1975, P.L. 93-448). However, Section 6 of H.J.Res. 1167 gave the President the option to waive the effect of the embargo until December 10, 1974. President Ford exercised this waiver authority on October 17, 1974. On December 10, 1974, the Turkish arms embargo went into effect.

Subsequently, the Foreign Assistance Act of 1974, enacted on December 30, 1974, continued the Turkish embargo and made it part of permanent law. Yet it also gave the President the option of temporarily waiving the embargo's effect until February 5, 1975. President Ford used this waiver to suspend the embargo from December 30, 1974, until February 5, 1975, at which time the Turkish embargo was restored. On October 6, 1975, President Ford signed into law P.L. 94-104, which partially lifted the arms embargo on Turkey. Successive statutes modified military aid and sales levels for Turkey while a partial embargo remained in effect. Finally, on September 26, 1978, President Carter signed into law P.L. 95-384, which authorized him to end the arms embargo against Turkey. The President exercised this authority on September 26, 1978.

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